

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs April 19, 2006

ANTIONE D. REDEEMER v. STATE OF TENNESSEE

Appeal from the Criminal Court for Montgomery County
No. 039021 Michael R. Jones, Judge

No. M2005-01159-CCA-R3-PC - Filed May 24, 2006

The petitioner, Antione D. Redeemer¹, appeals the Montgomery County Criminal Court's dismissal of his petition for post-conviction relief from his conviction for the sale of less than one-half gram of cocaine within one thousand feet of a school zone, a Class B felony, and resulting sentence of eight years at 100% in the Department of Correction. On appeal, the petitioner contends that because he was only seventeen years old at the time of the offense, his right to due process of law was violated when he entered a guilty plea in the Montgomery County Criminal Court without having been transferred to criminal court from the Montgomery County Juvenile Court. We agree that the petitioner's procedural due process right to a juvenile transfer hearing was violated and conclude that the trial court did not follow the procedures set forth in Sawyers v. State, 814 S.W.2d 725 (Tenn. 1991), for the purpose of assessing the prejudice of the due process violation. We reverse the trial court's dismissal of the petition and remand the case for further proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed, Case Remanded

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which DAVID H. WELLES and JOHN EVERETT WILLIAMS, JJ., joined.

Michael J. Love, Clarksville, Tennessee, for the appellant, Antione D. Redeemer.

Paul G. Summers, Attorney General and Reporter; Preston Shipp, Assistant Attorney General; John Wesley Carney, Jr., District Attorney General; and Helen Owsley Young, Assistant District Attorney General, for the appellee, State of Tennessee.

¹The record reflects different spellings of the petitioner's name: Antwon Donte Redeemer, Antoine Dante Redeemer, and Antione Dante Redeemer. The indictment states the defendant's name as John Doe, a.k.a., Dante, a.k.a., Half Dead. The amended indictment and the petition for post-conviction relief state the defendant's name as Antione D. Redeemer. We will employ the petition for post-conviction relief's spelling of the petitioner's name.

OPINION

At the petitioner's May 29, 2001 guilty plea hearing, where he was represented by attorney Greg Smith, the state introduced the following factual evidence of the crime:

During the Fall and Spring of 1996 and 1997, members of the Tennessee Bureau of Investigation, set up an operation based out of A15 Lincoln Homes here in Clarksville. The proof will show that on April 10th, [1997,] the morning of April 10th, [the petitioner] and Mr. Derrick Jenkins and a Mr. Frank Smith came to that apartment, sold approximately eight grams of crack cocaine to Agent Chuck Rountree. This transaction was videotaped. The tape will show that it was [the petitioner] who negotiated the price, accepted the cash and was the primary actor in this transaction.

The lab personnel will testify that it did test positive for crack cocaine. We would have testimony from a school system member stating that Burt School is an active school in the Montgomery County School System and also from Monroe Elliott, that A15 . . . is within a thousand feet of Burt Elementary School.

(Emphasis added). The trial court thereafter made the following inquiry of the defendant relevant to this appeal:

THE COURT: [What is] your date of birth?

[PETITIONER]: 5/19/79

On March 1, 2002, the petitioner filed a petition for post-conviction relief, alleging that he received the ineffective assistance of counsel and that other constitutional rights of his were violated. On April 9, 2002, the trial court appointed Assistant Public Defender Russell Church as counsel for the petitioner. On October 2, 2002, Mr. Church filed an affidavit, stating that he had been unable to prepare the petitioner's case for a post-conviction hearing because of health. On December 16, 2002, Mr. Church filed another affidavit, stating he had been unable to prepare the petitioner's case because of surgery. On March 28, 2003, the petitioner filed, pro se, an amended petition for post-conviction relief, alleging that his indictment was defective, his sentence was illegal, and his conviction was void. On December 18, 2003, the trial court appointed attorney Tim Wallace to replace Mr. Church as counsel for the petitioner. We note that the record reflects that neither Mr. Church nor Mr. Wallace filed either an amended answer or written notice that none would be filed. See T.C.A. § 40-30-107(b)(2) (stating that in all cases, "If counsel is appointed or retained, . . . counsel . . . must file an amended petition or a written notice that no amendment will be filed. . . . The written notice, if filed by counsel, shall state that counsel has consulted the petitioner and that the petitioner agrees there is no need to amend the petition.") (emphasis added).

We also note that the record on appeal is devoid of the post-conviction hearing transcript. However, it does contain a document entitled “Opinion,” which indicates that a post-conviction hearing was held. The June 11, 2004 trial court opinion states:

This cause came on to be further heard on the 27th day of May 2004, upon the Petition for Post Conviction Relief filed by the Petitioner and the amended Petition filed by the Petitioner.

. . . .

On May 29, 2001, the [petitioner] entered a plea of guilty to selling cocaine within 1000 feet of a school and received an 8-year sentence at 100%. No appeal was filed.

On July 2, 2001, the Petitioner sent a letter to the Circuit Court Clerk indicating that he was only 17 years old at the time of the sale of cocaine. On October 5, 2001 [the petitioner’s attorney] on behalf of the Petitioner filed a Motion to Alter or Amend the Judgment. At the hearing on this motion, it was discussed that the Petitioner was only 17 at the time of the offense. This Motion was denied.

On March 1, 2002, the Petitioner filed his Petition for Post Conviction Relief. On March 28, 2003, the Petitioner filed an amended Petition.

The issue that the [petitioner] was 17 at the time of the offense is properly before the court based on the letter from the Petitioner. The plea form and two affidavits of indigence show the date of birth to be May 19, 1979. The petitioner was 17 years and 326 days. At the time of the indictment, the Petitioner was over the age of 18.

. . . .

At the post conviction hearing, the State did not present any evidence concerning the Petitioner’s prior juvenile history, if any. Based on the testimony of the Petitioner at the post conviction hearing and the letter in the file, it is apparent that he is not mentally retarded or otherwise subject to commitment. [B]ased on the age of the Petitioner at the time of the commission of the offense and the original charge of selling over .5 grams of cocaine within 1000 feet of a school, this court believes without any doubt that the Petitioner would have been transferred to Circuit Court for trial; however, the

court at this time is unable to apply the factors listed in the statute [concerning juvenile transfer hearings] due to the lack of proof.

On its own volition the court sets this case for an additional hearing on July 29, 04 with the evidence limited to the factors listed in 37-1-134(b).

....

Conclusion: A hearing is set for 29 July 04 to determine whether or not the juvenile court would have held the Petitioner for trial as an adult. The remaining issues raised in the Post Conviction Petition and Amended Post Conviction Petition are denied.

(Emphasis added). The trial court then entered an order transferring the petitioner's case to the Montgomery County Juvenile Court for a juvenile transfer hearing.

At the juvenile transfer hearing, the juvenile court heard the testimony of witnesses and watched the videotape of the defendant's crime. The juvenile court then considered the factors listed in Tennessee Code Annotated section 37-1-134 and found that reasonable grounds existed that the petitioner committed the delinquent act of selling cocaine and that the petitioner was not committable to a mental health institution. The court also found that the interests of the community required that the petitioner should have been transferred based upon the petitioner's extensive delinquent juvenile file. Based upon the juvenile court's conclusions, the trial court dismissed the petitioner's petition for post-conviction relief on December 15, 2004.

On March 2, 2005, the petitioner filed a motion in the trial court asking that Mr. Wallace be replaced. The motion states in relevant part:

I have written to [my attorney] several times during the past two months. My most recent letter was dated February 7, 2005. H[is] reply letter was dated February 16, and I did not receive it until February 18, 2005. A copy of his letter is enclosed.²

In his letter, he says he believes he was only appointed to represent me in the post conviction hearing. However, his statement

²The letter states,

Dear Mr. Redeemer:

I was appointed to represent you in the post-conviction relief matter. That matter has been litigated. If you want to appeal that decision, you must file a pro-se petition to the Court to have counsel appointed for an appeal.

to that effect, is wrong, is it not? Isn't there a court ruling which says once the attorney is appointed at trial level his representation must continue through the first level of appeals? And even then his duties do not terminat[e] until released by the Court of Criminal Appeals?

By his statement that he does not know his duties, is evidence of his incompetence and lack of sufficient criminal case experience to allow him to continue to represent any criminal defendant without an experienced attorney to review his work prior to his filing or doing anything for his client. For that reason his court appointed fees should be withheld from him for any work he might have done in my case. . . .

. . . .

For the above reasons, I respectfully ask the Court to replace Mr. Wallace and appoint me another attorney with enough criminal case experience to know his responsibilities and duties. . . . Further, that the Court send me a copy of all papers filed by the Court, and copies of all papers filed by the State, and copies of all papers filed by Mr. Wallace; Further, that the Court vacate and reissue it's written ruling on my Post Conviction Petition so as to afford me a fair and meaningful opportunity to file an appeal; Further, that the Court notify the Board of Professional Responsibility of Mr. Wallace's lack of knowledge of his duties and responsibilities for their corrective actions as the Code of Ethics may require

On April 1, 2005, the trial court entered an order replacing Mr. Wallace with attorney Mike Love. The trial court noted that it was "unable to find any authority for this court to file again the order dismissing the post conviction petition." On April 29, 2005, Mr. Love filed an untimely notice of appeal.

On appeal, the petitioner contends his right to due process of law was violated by the failure of the state to afford him a meaningful and timely juvenile transfer hearing. He claims that affording him a transfer hearing seven years later "while adhering to the requirements of Sawyers v. State . . . undermines the spirit of the . . . law . . . and due process where possible rehabilitation could be assessed considering a defendant in his youth, rather than [seven] years later and with three years of prison wisdom." The state claims that the trial court properly complied with the Sawyers' procedures in denying the petitioner's petition and that no prejudice exists from the due process violation based upon the juvenile court's statement that it would have transferred the petitioner to circuit court had it been afforded the opportunity to do so.

Initially, we note that the petitioner's notice of appeal was untimely even though the state has not argued waiver in its brief to this court. We conclude that due process and the interests of justice require us to address the issues raised in the petitioner's appeal. See, e.g., State v. Scales, 767 S.W.2d 157 (Tenn. 1989); State v. Wilson, 530 S.W.2d 766 (Tenn. 1975); Warren v. State, 833 S.W.2d 101 (Tenn. Crim. App. 1992).

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Tennessee Code Annotated section 37-1-134 provides the procedure and the criteria by which a juvenile is transferred to adult court for prosecution. In Sawyers, the petitioner had previously pled guilty without undergoing a juvenile transfer hearing pursuant to section 37-1-134 based upon his erroneous assumption that he was eighteen years old. 814 S.W.2d at 726. In fact, the petitioner's date of birth was exactly one year later than he thought it to be. Id. Our supreme court held that a juvenile transfer hearing constituted a fundamental procedural due process right and that because the petitioner had not been afforded a transfer hearing, his right to due process of law had been violated. Id. at 729. In fashioning a remedy, the court stated,

Nor do we find the intermediate court's result adequate to redress the wrong in this case. Without the aid of a more fully-developed record, we cannot conclude that the due process error in this case was harmless, beyond a reasonable doubt. It may be, as the Court of Criminal Appeals suggested, that remand in this case will prove to be a mere formality. But, as did the United States Supreme Court in remedying a similar defect in Kent v. United States, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966), we conclude that the case must be returned to the trial court for a de novo hearing to determine whether or not Sawyers would have been transferred from juvenile to criminal court, based on the facts existing at the time of his indictment and trial. If the trial court finds that transfer would have been appropriate, the petitioner's conviction, otherwise unassailed in the record before us, will be permitted to stand. If not, it must be vacated and the prosecution recommenced in juvenile court, as required by statute.

For the reasons set out above, we reverse the judgment of the Court of Criminal Appeals and remand the case to the trial court for further proceedings.

Id. (emphasis added).

We conclude the present case presents circumstances well within the ambit of Sawyers. Our supreme court directed that such a case must be returned to the trial court for a de novo hearing to determine whether or not the defendant would have been transferred from juvenile to criminal court based on the facts existing at the time of the indictment and trial. We conclude the trial court erred in delegating its responsibility to the juvenile court, and, therefore, we reverse the dismissal of the petition. On remand, the trial court must conduct a de novo hearing and if it finds that the transfer would have been appropriate, the defendant's conviction should stand. If not, the trial court should vacate the defendant's conviction and the prosecution recommence in juvenile court as required by statute.

Based upon the foregoing and the record as a whole, we reverse the judgment of the trial court and remand this case for further proceedings consistent with this opinion.

JOSEPH M. TIPTON, JUDGE